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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT ONG HING and ALICE HING,
Petitioners,

vs.

HARVEY R. McELHANON and
DOREEN T. McELHANON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF ARIZONA

APPENDIX

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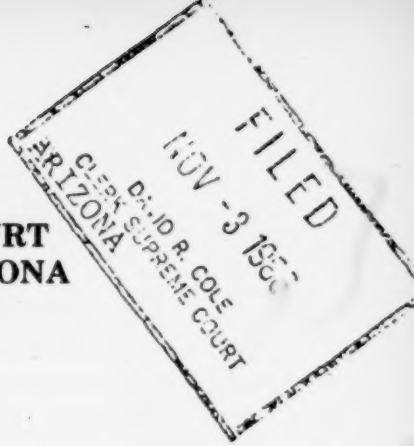
16pp

APPENDIX
TABLE OF CONTENTS

	Page
Opinion and Order of the Arizona Supreme Court, dated November 3, 1986	A-1
Opinion and Order of the Arizona Court of Appeals, dated October 1, 1985	A-19
Letter Order of the Arizona Supreme Court Granting Review, dated April 23, 1986	A-52
Order of the Arizona Supreme Court Granting Motion for Supplementation of Briefs, dated May 29, 1986	A-54
Letter Order of the Arizona Supreme Court Denying Motion for Reconsideration and Mandate, dated December 19, 1986	A-56
Petitioners' Motion for Reconsideration, dated November 18, 1986	A-60
Motion for Reconsideration filed in *Mister Donut of America, Inc. v. Harris,* 150 Ariz. 347, 723 P.2d 696, *vacated,* 150 Ariz. 321, 723 P.2d 670 (1986)	A-68



IN THE SUPREME COURT
OF THE STATE OF ARIZONA
En Banc

HARVEY R. McELHANON, JR., and DOREEN T. McELHANON, his wife,	)	No. CV 86 0128-PR
Plaintiffs-Appellees Cross-Appellants,	)	Court of Appeals No. 1 CA-CIV 5933
v.	)	
ROBERT ONG HING and ALICE HING, his wife,	)	Maricopa County Superior Court No. C-320360
Defendants-Appellants Cross-Appellees.	)	

Appeal from the Superior Court of Maricopa County
The Honorable David G. Derickson, Judge
AFFIRMED

Opinion of the Court of Appeals, Division One,
____ Ariz. ____, ____ P.2d ____ (1985)
Affirmed in Part, Vacated in Part

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FELDMAN, Justice

This case arises from a series of actions alleging fraud, embezzlement, and conspiracy surrounding the formation of a corporation in 1970. In this particular case, plaintiff (petitioner McElhanon), a judgment creditor, alleged a conspiracy to defraud and named the judgment debtor's attorneys as defendants. The sole issue before us is whether an ex parte conference between the trial judge, plaintiff, and plaintiff's attorney requires reversal of a jury verdict in plaintiff's favor. The court of appeals held that the trial judge erred in denying a mistrial motion based on the ex parte contact. *McElhanon v. Hing*, 1 CA-CIV 5933, slip op. at 32 (Ariz.Ct.App. Oct. 1, 1985). We accepted review pursuant to Rule 23, Ariz.R.Civ.App.P., 17A A.R.S. We have jurisdiction under Ariz. Const. art. 6, § 5 and A.R.S. § 12-120.24.

I. Facts

A. THE UNDERLYING TRANSACTION

In the summer of 1970, Harvey R. McElhanon, Jr. (McElhanon), John H. Greer, Jr. (Greer), and Charles Gilbert Harris (Harris) purchased stock in several corporations that acquired and operated four restaurants. The first restaurant purchased, Pinnacle Peak Patio, became the principal asset of Southwest Restaurants Systems, Inc. (Southwest), a new corporation formed by McElhanon, Greer, and Harris. All three principals contributed cash for the Pinnacle Peak Patio transaction. Although only McElhanon and Greer contributed cash for stock in the other corporations, each of the three men became owners of one-third of the stock in all the corporations. In return for McElhanon's and Greer's disproportionate capital contributions, Harris agreed to pay for his stock out of the corporations' profits. A formula was devised to determine the amount of Harris's obligation to McElhanon and Greer; the men agreed that the obligation would be forgiven if there were no profits.

B. McELHANON v. HARRIS AND GREER

In the fall of 1970, disputes arose among the three shareholders. McElhanon filed suit against Harris, Greer, and the corporations, demanding payment of $250,000 based on the formula and Harris's prior promise to pay his debt from profits. McElhanon also sought damages against Greer for maliciously interfering with Harris's obligation to pay and for committing, with Harris, acts of malfeasance and misfeasance in operating the corporations.

Shortly after the suit was filed, John Grace (Grace), counsel for Greer and Harris, began consulting with attorney Robert Ong Hing (Hing), defendant in this case. In September 1973, McElhanon's lawsuit against Greer and Harris went to trial with Hing representing Greer and Harris. On October 11, the jury returned a $200,000 verdict for McElhanon against Harris based on the repayment formula. The jury found Greer not liable. The following day, October 12, 1973, judgment on the verdict was entered in favor of McElhanon and against Harris.

The sequence of events following the verdict led to McElhanon's present claim against Hing. McElhanon alleges that after being informed of the verdict, Greer and Harris went to Hing's office to discuss the matter. Hing knew that Harris's only asset was his interest in Southwest. McElhanon alleged that to prevent collection of the judgment, Greer and Harris decided to have Greer purchase Harris's stock. Hing prepared a sale agreement to that effect. Harris's stock certificate in Southwest was cancelled and a new stock certificate was issued in Greer's name. The transaction was completed by October 13, 1973, the day after entry of judgment. As security for his legal fees from Greer and Harris, Hing retained Greer's Southwest stock certificates, the agreement between Greer and Harris, and the Greer-to-Harris note and assignment. McElhanon later claimed that the transfer of stock from Harris to Greer and Hing's assertion of an attorney's lien on the stock and the

proceeds of the transfer were fraudulent transactions facilitated by Hing and Grace.

On October 20, McElhanon served a writ of garnishment naming the corporations as garnishee-defendants. When the writ was answered, McElhanon learned that Harris's stock had been transferred to Greer, that Greer was indebted to Harris, and that Hing claimed an attorney's lien on the proceeds. McElhanon sought to set aside the sale of stock from Harris to Greer. Hing opposed McElhanon, arguing that Harris was not insolvent. McElhanon claims that Hing knew this to be untrue. Eventually, the order to show cause was dismissed. On November 14, Harris appealed the judgment against him.[1] While the appeal was pending, Southwest filed a reorganization petition under Chapter XI of the Bankruptcy Act and Harris and Greer filed voluntary bankruptcy petitions.

In the bankruptcy proceedings, McElhanon sought a determination that he was entitled to a judgment lien on the stock that Harris had sold to Greer. The law firm of Stockton and Hing opposed McElhanon's claim, arguing that it had a prior right to the stock by way of a retaining lien for its fees. It also claimed that Southwest was indebted to it for services rendered in defending McElhanon's action against Harris and Greer. Eventually, the bankruptcy court ruled that the October 13 stock transfer was a fraudulent conveyance and that the stock in Southwest was an asset of Harris's estate. The court also ruled that Hing had no claim against Southwest for legal services. These and other findings were upheld on appeal. *In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1241 (9th Cir. 1979); *In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1243 (9th Cir. 1979), *cert. denied*, 444 U.S. 1081, 100 S.Ct. 1035 (1980).

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[1] The judgment was eventually affirmed, *sub nom.*, *Perry v. McElhanon*, No. 1 CA-CIV 2635 (Ariz.Ct.App. Sept. 9, 1976) (memorandum decision).

C. THE PRESENT ACTION, McELHANON v. HING, GRACE, AND GREER

McElhanon filed the present case on September 23, 1975. He alleged that Hing and Grace had conspired with Harris and Greer to defraud him and had taken affirmative steps to hinder and prevent execution on his 1973 judgment against Harris. The trial was long and bitter; emotions engaged the attorneys as well as the parties. Toward the end of trial, the judge informed defendants' counsel that he wished to have a private meeting with plaintiff and his attorney. There was no objection, and the meeting took place in the judge's chambers. The subjects discussed went beyond those originally proposed by the judge. Defendants eventually moved for a mistrial, but the judge denied the motion and the trial continued. The jury was instructed that they could find against Hing if they found that he *knowingly* assisted his clients, Harris and Greer, to commit a fraud on McElhanon. Fraud was defined as "action of an affirmative, evil nature, such as . . . acting dishonestly, intentionally, maliciously and deliberately, with a wicked motive to deceive and cheat . . . ." On August 14, 1980, the jury returned a verdict of $286,120.

Implicit in the jury verdict is a finding that the stock transfer and lien transactions between Harris, Greer, and Hing were intentionally fraudulent. With respect to Harris and Greer, this finding is strengthened by the holdings in the two bankruptcy matters, *In re Southwest Restaurant Systems, Inc., supra*, and *In re Southwest Restaurant Systems, Inc., supra*. As far as Hing's knowledge is concerned, we agree with the conclusion of the court of appeals:

> The circumstantial evidence [at trial] strongly indicates that Hing drafted the stock transfer agreement and participated in the transfer discussion, knowing that Harris was or would be rendered insolvent, knowing that Greer was financially unstable if not insolvent, knowing that the consideration was inadequate and

> that the stock transfer agreement itself was a sham, and with the actual intention on Hing's part of hindering, delaying, and defrauding McElhanon. Additionally, based upon the delay occasioned by Hing's acts and those of his co-conspirators, including the looting of the corporation by the co-conspirators, the value of the stock subsequently decreased so as to give rise to a cause of action for money damages by McElhanon. . . .

Slip op. at 17.[2]

After judgment was entered against Hing and Grace, McElhanon settled with Grace and agreed not to execute against him. Hing's motions for a new trial and for judgment notwithstanding the verdict were denied and he appealed. McElhanon also appealed on the issue of damages.

D. DECISION OF THE COURT OF APPEALS

The court of appeals decided numerous issues, only one of which is before us. First, it determined that a cause of action lies against a judgment debtor's attorney who conspires to defraud the judgment creditor. The court found sufficient evidence to support the finding that Hing knowingly participated in such a conspiracy. Slip op. at 17. It then determined that the proper measure of damages was the value of the property fraudulently conveyed or the amount of the debt, whichever was less. *Id.* at 15. The court found that all elements of the tort were adequately stated in the instruction. *Id.* at 21.

On procedural issues, the court held that the trial judge did not abuse his discretion when he denied Hing's

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[2] For those who wish to learn even more of the sad history of this affair, *see United States v. Greer*, 607 F.2d 1251 (9th Cir.), *cert. denied*, 444 U.S. 993, 100 S.Ct. 526 (1979).

motion to sever the case. It further held that Evans, McElhanon's trial counsel, had acted improperly by repeatedly mentioning the prior bankruptcy judgment in front of the jury. However, relying on *Grant v. Arizona Pub. Serv.*, 133 Ariz. 434, 454, 652 P.2d 507, 527 (1982), the court of appeals found that the trial judge did not abuse his discretion in denying a mistrial because Evans's misconduct had not influenced the verdict.[3] Slip op. at 29. We approve the foregoing holdings together with the supporting analysis.

The court of appeals then reached the issue under review. It decided that the trial judge's denial of the mistrial motion based on ex parte contacts was an abuse of discretion. Addressing only that issue, we turn first to the specific facts surrounding the conference.

E. THE EX PARTE CONTACTS

In the fourth week of trial Evans attempted to impeach defendant Hing with prior deposition testimony. Hing objected to some of Evans's questions. His objection was sustained, possibly because the trial judge misunderstood Evans's question to the witness. A recess was called. In chambers, with all parties present, Evans objected strenuously, claiming that the judge was hostile to him and that this hostility was being communicated to the jury. He also took umbrage at a perceived accusation that he was guilty of misrepresenting the facts. A heated exchange occurred.

The next morning, the judge read the disputed portions of the record. Evidently wishing to spread oil on troubled waters, he told defense counsel that he was going to have a private conference with McElhanon and Evans to explain that he did not believe Evans was guilty of any

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[3] Whatever the extent of the impropriety in Evans's references to the bankruptcy proceeding, that impropriety presumably was rendered harmless when the judgments in bankruptcy were subsequently admitted in evidence.

ethical improprieties. Defense counsel made no objection. McElhanon and Evans were alone with the judge in chambers. However, at Evans's request a court reporter transcribed the proceedings.

The judge explained that he was not accusing Evans of improprieties. His feelings not assuaged, Evans expanded the subject of the conference by accusing Hing and his counsel of perjury. McElhanon also related hearsay about one of the defendants lying on the witness stand and accused both Grace and Hing of fraud. He requested that bar proceedings be brought against defendants and defense counsel. The judge explained that "my [only] role in this case is to insure that plaintiff and defendants get a fair trial. . . ."

After a short recess, counsel for all parties met in the judge's chambers. The judge apologized for any accusations of impropriety against Evans and described the serious allegations of perjury and subornation that had been made against defendants. Defense counsel requested that the judge avoid further ex parte discussions. The court reporter read the transcript of the previous discussion. The proceedings then adjourned at defense counsel's request.

Defense counsel subsequently argued that the ex parte proceedings had violated the Code of Judicial Conduct and had affected the judge's view of the case. He questioned the judge's impartiality. The judge stated that the allegations of perjury were irrelevant to the matter before him and that he felt unaffected by plaintiff's allegations. However, the judge conceded that he was concerned about appearances, and that he wanted to ensure both sides a fair trial. Defense counsel moved for a mistrial on grounds of impropriety and judicial misconduct. The judge declared a recess to discuss the matter with the presiding judge.

When the court reconvened, the judge repeated his previously expressed views but, fearing an appearance of impropriety, he also stated that he was inclined to grant the motion for a mistrial. Evans urged the judge to recon-

sider his decision. He claimed that it would be a miscarriage of justice to retry the case a month into the trial when the jury knew nothing of the events and the judge had repeatedly stated that his view of the case was unaffected. The judge then denied the motion for mistrial, stating that he found no clear violation of professional conduct, that he had invested an enormous amount of work in the case, and that his impartiality was unaffected by the allegations.

II. Discussion

A. IMPROPRIETIES IN THE PROCEEDINGS

The court of appeals held that the ex parte conference was improper. Slip op. at 33–36. We agree. The rule is that

> "[e]xcept as authorized by law, [a judge should] neither initiate nor consider ex parte applications concerning a pending or impending proceeding."

Canon 3(A)(4), Code of Judicial Conduct, Rule 81, Ariz.R.S.Ct., 17A A.R.S.; *see also Roberts v. Commission on Judicial Performance*, 33 Cal.3d 739, 747, 661 P.2d 1064, 1068, 190 Cal.Rptr. 910, 914 (1983); *In re Fisher*, 31 Cal.3d 919, 647 P.2d 1075, 184 Cal.Rptr. 296 (1982); *Matter of Berk*, 98 Wis.2d 443, 297 N.W.2d 28 (1980). The rule is unaffected by the judge's good faith belief that he had been hasty in chastising plaintiff's attorney. One reason such contacts are improper is that no matter how pure the motive any ex parte contact may allow the judge to be improperly influenced or inaccurately informed. *In Re Conduct of Burrows*, 291 Or. 135, 145, 629 P.2d 820, 826 (1981).

The error was not cured by the judge either telling opposing counsel of his intentions or obtaining consent for the ex parte contact. Counsel reasonably might feel constrained from objecting to the judge's request for a conference. Canon 3(A)(4), *supra*, does not permit the judge to solicit a party's consent for the judge's ex parte discussions

with another party; rather, it prohibits the judge from initiating ex parte communications about the pending case. In our view, the judge's solicitation of consent is a form of initiation. Nor can we give weight to the judge's desire to apologize to counsel for a misunderstanding. If a judge wishes to mend his fences during trial, he must invite all parties inside the gate. The events that took place in this case illustrate the dangers of even innocently conceived ex parte meetings.

The court of appeals correctly noted that the judge was not alone in acting improperly. Slip op. at 35. Evans never should have agreed to the ex parte conference. DR 1-103, 7-110(B), Rule 29(a), Ariz.R.S.Ct., 17A A.R.S.[4] Furthermore, Evans's *expansion* of the content of the ex parte contact to include perjury allegations was improper. He also had a duty to restrain his client from injecting potentially prejudicial hearsay into the conversation. *Cf.* DR 7-110(B).[5] We understand, but cannot condone, the reluctance of an attorney to refuse to confer when "requested" to do so by the trial judge.

B. IS REVERSAL REQUIRED?

The court of appeals held that when the trial judge denied the motion for a mistrial, he "lost control of the case and there could no longer be a fair and impartial trial." Slip

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[4] The events in questions occurred prior to adoption of the Rules of Professional Conduct, Rule 42, Ariz.R.S.Ct., 17A A.R.S. Therefore, disciplinary rules are cited to the Code of Professional Responsibility, Rule 29(a), Ariz.R.S.Ct., 17A A.R.S.

[5] We can criticize McElhanon almost to the same extent as Evans. The judge invited McElhanon to a private conversation and McElhanon was led into the inner sanctum by his own attorney. While most laymen might feel it was perfectly proper to take advantage of the golden moment to make the judge see the true nature of the opposition, it is fair to assume that McElhanon, who by virtue of this series of disputes has more litigation experience than most lawyers, knew better. In addition, McElhanon made racial slurs about Hing. We condemn his remarks.

op. at 32. The court held that the ex parte contacts were unauthorized by law and "totally destroyed the sanctity of a fair trial." *Id.* at 35. It also found that the impropriety had affected the outcome of the trial because, after the ex parte conference, the judge changed his mind and submitted the punitive damage issue to the jury. *Id.* at 36.

Thus, the court of appeals made two related holdings. First, prejudice was presumed because of the nature of the improprieties. Second, "the impropriety of this ex parte proceeding [may have] affected the outcome of the trial," *id.* at 36, thereby prejudicing defendant.

1. *Presumed Prejudice*

The court of appeals relied on *Grant v. Arizona Pub. Serv., supra.* We reaffirm in the strongest terms our statement in *Grant* that we will not hesitate to require retrial when a trial judge loses control of a case and allows counsel to engage in conduct that precludes a fair trial. The issue is whether a fair trial was possible in this case.

Grant considered cases in which prejudice was presumed. For example, in *Love v. Wolf*, 226 Cal.App.2d 378, 38 Cal.Rptr. 183 (Cal.Ct.App. 1964), prejudice could not be demonstrated, but a serious impropriety had occurred without the court admonishing the jury. The record in *Love* showed that the court had lost control of the entire proceedings, allowing counsel to engage in conduct described by the appellate court as "egregious beyond any in our experience or . . . related in any reported case. . . ." 226 Cal.App.2d at 382, 38 Cal.Rptr. at 184. *Grant* held that under such circumstances, prejudice could be presumed and that he would "have no hesitancy in finding that denial of a motion for a new trial was an abuse of discretion." 133 Ariz. at 456, 652 P.2d at 529; *see also Simmons v. Southern Pacific Transp. Co.*, 62 Cal.App.3d 341, 133 Cal.Rptr. 42 (Cal.Ct.App. 1976); *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky.) (judge allowed numerous acts of prosecutorial misconduct, including permitting the state to call a minister

to testify in rebuttal that the death penalty was approved by biblical teaching and that jurors would be condemned by God if they failed to recommend defendant's execution), *cert. denied*, _____U.S. _____, 105 S. Ct. 192 (1984).

In this case, all improprieties occurred outside the jury's presence. The jury was never aware that anything untoward had occurred. Except for the one ex parte conference, serious as it was, the trial judge did not permit continual episodes of misconduct by counsel. Unlike *Love* and *Ice,* the trial judge here sustained well-taken objections, struck improper remarks, and properly admonished and instructed the jury. Except for the ex parte conference, the record shows a trial judge who kept control of a very difficult case, rather than one who lost control. In a long and hard fought case, even "[s]killed advocates are not always endowed with 'high boiling points.'" *Love v. Wolf*, 226 Cal.App.2d at 393, 38 Cal.Rptr. at 192. This was not a case where loss of control created a virtual mockery of the concept of a fair and impartial trial. *Cf. Love v. Wolf, supra.* We do not believe the rule of presumed prejudice mentioned in *Grant* is applicable.

2. *Appearance of Inpropriety*

Hing argues that reversal is required because the appearance of impropriety affected the integrity of the judicial process. Even where there is no actual bias, justice must appear fair. *State v. Romano*, 34 Wash.App. 567, 569, 662 P.2d 406, 407 (Wash.Ct.App. 1983) (citing *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955)). By definition, ex parte contacts are rarely on the record and, therefore, are usually unreviewable. Thus, such contacts cast doubt upon the adversary system and give the appearance of favoritism. *See In re Burrows*, 291 Or. 135, 145, 629 P.2d 820, 826 (1981).

We do not believe the events that occurred here threaten the integrity of the judicial process. The trial judge gave notice of his intentions and no objection was made. When the ex parte conference ended, the trial judge imme-

diately notified the opposing parties of the plaintiff's accusations and the expanded scope of the ex parte proceeding. The transcript of that proceeding was read to defendants and they were allowed to respond. Arguments were had over the propriety of the ex parte conference. The judge reiterated his statements of impartiality and repeatedly stated that he viewed the allegations against Hing as irrelevant to the issues before him.

In *State v. Brown*, 124 Ariz. 97, 602 P.2d 478 (1979), we reversed a verdict entered after a trial judge had initiated ex parte conversations with a prosecutor concerning possible perjury. The judge insisted, on more than one occasion, that perjury charges be brought against a defendant because he was offended that the perjury was so blatant. Defense counsel was not notified about the ex parte contacts until the judge had revoked defendant's bond.

We do not believe *Brown* controls this case. In *Brown*, the judge "gave the appearance of abandoning his role as a fair and impartial judge" and began "to act in the dual capacity of judge and advocate." 124 Ariz. at 100, 602 P.2d at 481. We held that reversal is required when a judge becomes so personally involved that there is an appearance of hostile feeling, ill will, or favoritism toward one of the litigants. *Id.* No such appearance was given in this case. *Compare State v. Mincey*, 141 Ariz. 425, 444, 687 P.2d 1180, 1199 (judge had ex parte contact regarding the difficulty of sentencing), *cert. denied*, _____U.S. _____, 105 S.Ct. 521 (1984) *with State v. Valencia*, 124 Ariz. 139, 140-41, 602 P.2d 807, 808-09 (1979) (relative of victim had private conversation with judge and urged imposition of death sentence; the judge told no one, no contemporaneous record was made, and the information imparted pertained to *facts* relevant to the sentencing procedure).

The present case is similar to *State v. Perkins*, 141 Ariz. 278, 686 P.2d 1248 (1984). In *Perkins*, we noted that the trial judge "remained neutral and did not make a judgment" after receiving letters alleging perjury from a code-

fendant. 141 Ariz. at 286, 686 P.2d at 1256. The trial judge informed counsel that he would provide a fair trial and that counsel would have to use his own judgment regarding the use of potentially perjured testimony. 141 Ariz. at 286-87, 686 P.2d at 1256-57. We held that the judge showed no prejudice, especially because he conferred with other judges after receiving the letters and then told all counsel involved. *Id; see also United States v. Jackson*, 430 F.2d 1113 (9th Cir. 1970) (revocation of bail bond on information received in ex parte communication did not require disqualification).

Here, as in *Perkins*, the judge never lost the appearance of impartiality. In his efforts to remain neutral, he even consulted the presiding judge, a completely proper course of conduct. *See* Canon 3(A)(4), Code of Judicial Conduct, Rule 81, Ariz.R.S.Ct., 17A A.R.S.; *State v. Perkins*, 141 Ariz. at 287, 686 P.2d at 1257; *Gaston v. Hunter*, 121 Ariz. 33, 59, 588 P.2d 326, 352 (1978).

Appearances might have been different if the events that transpired at the ex parte conference had been hidden from defendants. However, the contemporaneous *record* shows that when plaintiff, not the judge, expanded the scope of the conference, the judge asserted his independence and impartiality and then terminated the conference, promptly informing defendants of the allegations made against them. Thus, unlike *State v. Valencia*, the ex parte communication did not provide the judge with new and unrebutted factual information on the very issues that he was to decide. While the conference was improper, *see ante* at ___, we do not believe the essential fairness of the entire proceeding was left in question. No appreciable doubt was cast upon the integrity of the judicial process.

Defendant argues that the nature of the accusations made to the judge at the ex parte conference were calculated to adversely influence his views of the defendant and, therefore, the appearance of impropriety rule requires reversal. We disagree. The accusations did not come as a surprise to the judge; similar charges had been made in open court. A

judge often hears prejudicial evidence, allegations, or accusations against one party. Judges are trained to hear and consider such information and, if they find it irrelevant or inadmissible, to put it aside and discharge their duties in accordance with the law. We need not reverse merely because the judge heard the derrogatory [sic] comments made by McElhanon in chambers. If reversal would be required here, then a similar argument could have been made when the judge heard McElhanon's comments in open court, or if he had heard extremely prejudicial evidence in a motion to suppress and ruled it inadmissible. *United States v. Meinster*, 488 F.Supp. 1342, 1348-49 (S.D.Fla. 1980), *aff'd*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965 (1982).

Defendant argues that justice must not only be done fairly but that it must be perceived as having been fairly done. We agree. Anything else tends to undermine public confidence in the judicial system. This principle, however, does not help defendant in the case at bench. The transactions giving rise to this case commenced almost seventeen years ago. The first legal action was filed over fifteen years ago. The alleged conspiracy formed at Hing's office occurred thirteen years ago. The case now before us was filed eleven years ago. During this period of time, the parties have been involved in at least three superior court lawsuits, two of which were tried, one arbitration proceeding, and three hotly contested adversary trials in bankruptcy court. There have been five federal appeals,[6] three appeals in our appellate system, and two previous petitions for review by this

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[6] *In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1237 (9th Cir. 1979); *In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1241 (9th Cir. 1979); *In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1243 (9th Cir. 1979) *cert.denied*, 444 U.S. 1081, 100 S.Ct. 1035 (1980); *In* re Southwest Restaurant Systems, Inc., 607 F.2d 1248 (9th Cir. 1979); *United States v. Greer*, 607 F.2d 1251 (9th Cir.), *cert. denied*, 444 U.S. 993, 100 S.Ct. 526 (1979).

court.[7] There have been five petitions in this court seeking extraordinary relief by special action.[8] There have been two petitions for writ of certiorari from the United States Supreme Court.[9]

The parties have had more than their day in court. There comes a time when every case must end; otherwise, the process becomes more important than the resolution. We would not affirm the verdict if a significant appearance of judicial impropriety existed. However, we believe that given the long history of this case, reversal based on mere appearance of impropriety, without any actual prejudice, would significantly undermine the integrity of the judicial system. This sequel to the saga of the Hatfields and McCoys has had all of the scrutiny that the judicial system can afford. It is time to put an end to this affair unless the impropriety actually prejudiced the result.

3. *Actual Prejudice*

Finally, therefore, we must determine if there is a reasonable probability that defendant was prejudiced as a result of the ex parte communication. *State v. Brown*, 124 Ariz. 97, 100, 602 P.2d 478, 481 (1979); *see also State v. Packett*, 206 Neb. 548, 552, 294 N.W.2d 605, 608 (1980).

Defendant argues that prejudice can be found because, after the perjury accusation made at the ex parte

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[7] *Hing v. Southwest Restaurant Systems, Inc.*, 1 CA-CIV 4058 (Ariz.Ct.App. Mar 1, 1979) (memorandum decision); *Perry v. McElhanon*, 1 CA-CIV 2635 (Ariz.Ct.App. Sept. 9, 1976) (memorandum decision); and the present case.

[8] *McElhanon v. Superior Court*, Supreme Court No. 11505 (1974); *McElhanon v. Superior Court*, Supreme Court No. 11557 (1974); *McElhanon v. Superior Court*, Supreme Court No. 12462 (1976); *Hing v. Chatwin*, Supreme Court No. 13208 (1977); *Hing v. Chatwin*, Supreme Court No. 13690 (1978). Jurisdiction was declined in each case.

[9] *See* note 6, *supra*.

conference, the judge decided to give a punitive damages instruction. We disagree. When asked earlier in the trial, the judge had stated that sufficient evidence had not yet been produced to warrant an instruction on punitive damages. After the conference and by the close of McElhanon's case, he had changed his mind. If the jury had awarded punitive damages there might be some force in the argument that a significant possibility of prejudice existed when the judge decided to give the punitive damage instruction. However, the jury awarded *no* punitive damages. Therefore, there is no possibility that defendant sustained prejudice.

The verdict was obviously not the result of passion or prejudice. The jury denied all punitive damages and brought in a verdict well within reason on the compensatory claim. The verdict of $286,000 is not based on intangible items such as pain and suffering; it is the approximate amount of the loss sutained by McElhanon because of his inability to collect the $200,000 judgment awarded against Harris in 1973. As the court of appeals indicated, slip op. at 15, the trial court correctly instructed that the amount of damages recoverable was limited to the amount of the antecedent debt which McElhanon was unable to collect from Harris plus incidental expenses. The compensatory damages awarded were within the limits of the court's instructions and of *defendant's own* proposed jury instruction. No possible bias affecting the jury instructions has been demonstrated. The key instructions on the legal issues were correct statements of the law. Of more than forty instructions given to the jury, all but one were in the form submitted by defendant. The misconduct did not prejudice defendant.

III. Conclusion

Review of the entire record leads to the inescapable conclusion that at long last justice in this case has been done. Ariz. Const. art. 6, § 27. All parties have had their day in court and it is time to bring this matter to a final conclusion. We approve the decision of the court of appeals

except as to its determination that reversal was required because of the ex parte communications. That portion of the opinion is vacated. The judgment of the trial court is affirmed.

STANLEY G. FELDMAN, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

HARVEY R. McELHANON, JR., and DOREEN T. McELHANON, his wife,	)	1 CA-CIV 5933
	)	DEPARTMENT A
Plaintiffs-Appellees Cross-Appellants,	)	OPINION
v.	)	
ROBERT ONG HING and ALICE HING, his wife	)	
Defendants-Appellants Cross-Appellees.	)	

Appeal from the Superior Court of Maricopa County
Cause No. C-320360
The Honorable David G. Derickson, Judge
REVERSED AND REMANDED

Jack E. Evans, Ltd.
by Jack E. Evans
Attorneys for Plaintiffs-Appellees
Cross-Appellants — Phoenix

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GRANT, Judge

This appeal raises the question of whether there is a cause of action against an attorney who, while acting in his capacity as an attorney, engages in a conspiracy to defraud a judgment creditor of his client. A cross-appeal raises the issue of whether a judgment creditor may recover damages in excess of his judgment plus incidental costs as a result of an alleged conspiracy to hinder him from collecting his judgment. Several sub-issues are raised in relation to the main issue on appeal.

Facts

I. History of Parties' Relationships.

A detailed history of the facts leading up to this lawsuit is necessary for an understanding of the issues raised on appeal. In the summer of 1970, appellee Harvey R. McElhanon, Jr. (McElhanon), John H. Greer, Jr. (Greer), and Charles Gilbert Harris (Harris) purchased stock in several corporations which operated restaurants. One group of restaurants was acquired through the acquisition of stock in corporations owning the restaurants. The stock of these corporations was placed in escrow as security for payment of the purchase price. Another restaurant, Pinnacle Peak Patio, was owned by the Southwest Restaurants Systems, Inc. (Southwest), a new corporation formed by McElhanon, Greer and Harris. McElhanon and Greer each contributed $85,000 as down payment for the stock of these corporations. McElhanon, Greer and Harris each became owner of one-third of the stock in each of the corporations.

In return for his receiving his stock ownership, Harris agreed to forego dividends from the restaurants until the initial down payment by McElhanon and Greer had been returned to them. A formula was devised whereby Harris would waive $250,000 in dividends, and after that sum was reached, would thereafter participate equally in the dividends. This agreement was reached because Harris

was unable to pay his one-third share of the purchase price. Part of this agreement was that if there were no profits Harris incurred no obligation to pay.

II. Maricopa County Cause No. C-249999

Several months following the purchase of the stock in the corporations, in the fall of 1970, disputes arose among these three shareholders. In May, 1971, John Philip Grace (Grace), the lawyer for the corporations (also the personal attorney of Greer), wrote to McElhanon's attorney requesting that McElhanon sell his interest in the corporations to Greer and Harris. McElhanon declined. In May, 1971, at a corporate meeting McElhanon was not re-elected as an officer of the corporations. At the time McElhanon was primarily responsible for operating the restaurant known as Pinnacle Peak Patio. About that time McElhanon filed suit in Maricopa County Cause No. C-249999 against Harris, Greer, and the corporations seeking both a determination that Southwest and the other corporations were a partnership, not a corporation, and seeking monetary relief: payment of $250,000 based on Harris's prior promise to pay that sum; damages against Greer for maliciously interfering with Harris's obligation to pay that sum, and damages on the grounds that Greer and Harris had committed acts of malfeasance and misfeasance against the corporations.

Grace originally represented the defendants in that action. Shortly after the suit was filed Grace began consulting with attorney Robert Ong Hing (Hing) who is the defendant/appellant in this appeal. In accordance with a shareholders' agreement among Harris, Greer and McElhanon, an application for arbitration as to the value of the stock of the corporations was filed and arbitration hearings were held. Harris and Greer eventually retained Hing as counsel for them individually. Apparently on one occasion Grace stated that Hing was hired because Grace had a conflict in representing both Southwest and Greer and Harris personally. Although the record is somewhat confused on this point it is clear that Grace and Hing con-

sulted frequently about matters relating to the lawsuit in cause no. 249999.

In the spring of 1972, an arbitration proceeding determined that McElhanon's one-third stock interest was worth $483,600. An attempt to reduce the arbitration award was unsuccessful.

In September, 1973, a trial was held in cause no. C-249999. Hing represented Greer and Harris in the action. On October 11, 1973, the jury returned a verdict in C-249999 in the amount of $200,000 in favor of McElhanon and against Harris based on Harris's promise to pay that amount from the dividends of the corporation. No relief was given against Greer. The following day judgment was entered on the jury's verdict. On the date the judgment was entered against Harris his interest in the restaurant corporation was the only asset which could be used to satisfy McElhanon's judgment.

It is the sequence of events following the return of the jury's verdict in cause no. 249999 and entry of the judgment against Harris on October 12, 1973, which caused McElhanon to bring the instant action against Greer, Grace and Hing for an unlawful conspiracy to defraud McElhanon's rights as a judgment creditor. McElhanon claimed that as a result of the participation of Greer, Grace and Hing in this sequence of events that his rights as a judgment creditor were rendered worthless, the restaurant corporations became bankrupt, and, in addition, McElhanon's one-third interest in those restaurant corporations became worthless. Although the record is confused, the main allegation is that, after being informed of the verdict, Greer and Harris went to Hing's office to discuss the matter. During the course of the meeting they apparently expressed a desire to have Greer purchase Harris's stock in the corporations. Hing prepared a sale agreement to that effect. Harris's stock certificate in Southwest was cancelled and a new stock certificate was issued in Greer's name and the transaction was completed by October 13,

1973. McElhanon claims that the transfer of this stock to Greer was fraudulent and was facilitated by Hing and Grace. Because there were outstanding legal fees owed to Hing by Greer and Harris, Hing retained the Southwest stock certificates, the agreement, and the note and assignment as security for his fees. Hing subsequently filed post-judgment motions as well as a motion for a stay which was granted pending a ruling on the post-trial motions.

On October 20th, prior to the order staying execution, McElhanon had a writ of garnishment served against the corporations as garnishee defendants. The writ was timely answered. In the answer it was disclosed that Harris did not own any stock in the corporations and that Greer was indebted to Harris. As a result of this answer McElhanon became aware of the sale of stock from Harris to Greer. McElhanon filed an application for an order to show cause to set aside the sale of stock from Harris to Greer. The order to show cause was dismissed. On November 14, Harris appealed the judgment against him. On the same day Harris, Greer and Southwest signed a promissory note in favor of Hing and his law partner in the sum of $25,000 for fees owed.

III. The Bankruptcy Actions.

On July 26, 1974, Southwest filed a voluntary bankruptcy petition under Chapter XI of the Bankruptcy Act. In February, 1975, Harris filed a voluntary bankruptcy petition. In October, 1976, Greer filed a voluntary bankruptcy petition. The bankruptcy court ruled that the October 13th agreement was a fraudulent conveyance and that Harris's bankruptcy trustee owned the stock in Southwest.

McElhanon sought a determination in the Harris bankruptcy action that he was entitled to a lien on the stock which Harris had sold to Greer. The law firm of Stockton and Hing opposed McElhanon's claim on the ground that it had a prior right to the stock because of its retaining lien for its fees. The bankruptcy judge ruled in favor of Mc-

Elhanon. Stockton and Hing appealed that decision to federal district court. The district court reversed the bankruptcy court and ruled that Stockton and Hing's lien was superior to McElhanon's claim based on his writ of garnishment. McElhanon appealed the district court's decision to the Ninth Circuit, which reversed the district court and reinstated the judgment of the bankruptcy court.

While these various actions were being litigated both McElhanon and Hing bid for the stock of Southwest in the reorganization proceedings. McElhanon's bid was accepted by the court. McElhanon paid $700,000 in cash for the new stock and assumed an existing encumbrance on the Pinnacle Peak Patio Restaurant in the amount of $400,000.

IV. The Instant Action (Maricopa County Cause No. C-320360).

McElhanon filed the instant action on September 23, 1975. He amended his complaint on March 14, 1980 to contain four counts. Count 1 was an allegation of an unlawful conspiracy among Harris, Greer, the law firm of Stockton and Hing, Stockton and Hing individually, and Grace to defraud McElhanon as a judgment creditor and to violate certain statutes. Count 2 alleged that the firm of Stockton and Hing breached its statutory duties as a garnishee defendant. Count 3 alleged that Greer breached his statutory duties as a garnishee defendant. Count 4 alleged that Grace breached his duties as a garnishee defendant and that Grace and Greer breached their duties as agents of the garnishee defendants. The court granted Hing's and Grace's motions for summary judgment as to Counts 2 and 4. The court limited McElhanon's damages on Count 1 to the lesser amount of McElhanon's judgment against Harris or the value of Harris's stock in Southwest at the time of service of writ of garnishment upon Southwest, plus McElhanon's incidental expenses in obtaining the stock.

Trial began on July 8, 1980. Several motions for mistrial occurred throughout the proceedings which relate to

issues raised in this appeal. The jury deliberated for six days and reached a verdict on August 14, 1980, against Hing and Grace in the amount of $286,120. The jury denied a request for punitive damages. Prior to submitting the case to the jury, the court directed a verdict against Greer. The court did not inform the jury of the directed verdict but allowed the jury to render its decision as to Hing and Grace prior to the jury's deliberations on Greer. Judgment was entered against Hing and Grace in the sum of $286,120 in favor of McElhanon. McElhanon thereafter settled his dispute with Grace and agreed not to execute on his judgment against him. Hing's motions for a new trial and for judgment notwithstanding the verdict were denied and a notice of appeal was filed by Hing. McElhanon filed a notice of cross-appeal from that part of the judgment limiting damages to $286,120 and from the order denying his motions for new trial as to damages only.

Other facts will be set forth in the discussion of the issues to which they relate.

Cause of Action

IS THERE A CAUSE OF ACTION AGAINST AN ATTORNEY, ACTING IN HIS CAPACITY AS AN ATTORNEY, FOR CONSPIRACY TO DEFRAUD A JUDGMENT CREDITOR OF HIS CLIENT?

In connection with the issue as stated, Hing claims that: (1) there is no cause of action for participating in a fraudulent conveyance against one not a party to the conveyance; (2) there is no civil action for conspiracy in Arizona; (3) an attorney is not liable to an adverse party for actions taken as an attorney for his client.

1. *Is there a cause of action for participating in a fraudulent conveyance against one not a party to the conveyance?*
2. *Is there a civil action for conspiracy in Arizona?*

We disagree with Hing as to his first proposition, that there is no cause of action against one not a party to an allegedly fraudulent conveyance. When a civil wrong occurs as the result of concerted action, the participants in the common plan are equally liable. W. Prosser and W. P. Keeton, *The Law of Torts,* § 46 at 323 (5th ed. 1984). The word "conspiracy" is generally used in connection with imposing vicarious liability for concerted action. *Id.* at 324.

When a claim is labelled "conspiracy," a distinction must be made between a claim based solely on an agreement and on one based upon the acts performed in accordance with the agreement. In *Tovrea Land and Cattle Co. v. Linsenmeyer,* 100 Ariz. 107, 131, 412 P.2d 47, 63 (1966), the Arizona Supreme Court stated, "[t]here is no such thing as a civil action for conspiracy. The action is one for damages arising out of the acts committed pursuant to the conspiracy," citing *Hale v. Brown,* 84 Ariz. 61, 323 P.2d 955 (1958). The thrust of *Tovrea* is that a mere agreement to do a wrong imposes no liability; an agreement plus a wrongful act may result in liability. The *Tovrea* case stated: "The damage for which recovery may be had in such a civil action is not the conspiracy itself but the injury to the plaintiff produced by the specific overt acts." 100 Ariz. at 131, 412 P.2d at 63.

In holding as we do, we agree with the reasoning of the Wisconsin Supreme Court as set forth in *Onderdonk v. Lamb,* 79 Wis. 2d 241, 246–47, 255 N.W. 2d 507, 509 (1977):

> "The law of civil conspiracy is: . . characterized in this state by the following:
>
> " 'It is the established law of this state that there is no such thing as a civil action for conspiracy. There is an action for damages caused by acts pursuant to a conspiracy but none for the conspiracy alone. In a civil action for damages for an executed conspir-

> acy, the gist of the action is the damages.' *Singer v. Singer* (1944), 245 Wis. 191, 195, 14 N.W. 2d 43."

> The gravamen of a civil action for damages resulting from an alleged conspiracy is thus not the conspiracy itself but rather the civil wrong which has been committed pursuant to the conspiracy and which results in damage to the plaintiff. The resultant damages in a civil conspiracy action must necessarily result from overt acts, whether or not those overt acts in themselves are unlawful.

McElhanon concedes that the fraudulent conveyance, without more, created no liability against Hing since the fraudulent conveyance, but for Hing's additional acts, would have been set aside shortly after it was accomplished and McElhanan would have suffered only minimal damages. McElhanan urges however, that Hing's conduct not only included participating in the fraudulent conveyance, but participation in a conspiracy to destroy McElhanon's right to acquire the Harris stock.

The next question then is whether there was a wrongful act. Hing suggests that a cause of action for participating in a fraudulent conveyance should be limited, as other courts have done, to instances where a creditor has an actual, present lien against a debtor. *Adler v. Fenton,* 65 U.S. (24 How.) 407, 16 L.Ed. 696 (1861); *Hadden v. United States,* 130 F. Supp. 610 (1955); *Lamb v. Stone,* 28 Mass. (11 Pick.) 527 (1831); *see generally,* Annot., "Right of Creditor to Recover Damages for Conspiracy to Defraud Him of Claim," 11 A.L.R. 4th 345 (1982). The principle behind the "lien requirement" rule is that until a creditor obtains a lien, giving him vested or specific rights in the debtor's property, the debtor is legally free to do what he will with his property. *Adler v. Fenton.* Although McElhanon argues to the contrary, from a factual standpoint it appears clear

that the allegedly fraudulent stock transfer between Harris and Greer occurred on October 13, 1973. Since the writ of garnishment was not served until October 20, McElhanon was not a lien creditor at the time of the transfer. *See Menner v. Slater,* 148 Cal. 284, 83 P. 35 (1905). Thus, under the "lien requirement" theory there was no wrong committed against McElhanon.

There is another view which holds that a general or judgment creditor does suffer a legal wrong from a fraudulent conveyance. *Celano v. Frederick,* 54 Ill. App. 2d 393, 203 N.E. 2d 774 (1964); *Smith & Crittenden v. Sands,* 17 Neb. 498, 23 N.W. 356 (1885); *Dalton v. Meister,* 71 Wis. 2d 504, 239 N.W. 2d 9 (1976) (11 A.L.R. 4th 332). We agree that a lien is not necessary before there is an actionable wrong. Arizona's adoption of the Uniform Fraudulent Conveyance Act, A.R.S. §§ 44-1001 to 44-1013 (UFCA) is particularly persuasive on this point. The UFCA makes such transfers unlawful as against creditors without a lien and even as to creditors without a judgment. We are not relying on the UFCA per se[1] but on the public policy thereby adopted.

We agree with the reasoning of the Wisconsin Supreme Court in *Dalton v. Meister,* where the court recognized a cause of action for conspiracy to commit a fraudulent conveyance. The court held that upon passage of the Uniform Fraudulent Conveyances Act, a conveyance to defraud a general creditor became a legal wrong, properly the subject of a suit for civil conspiracy. The cause of action requires a combination of two or more persons who, by some

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[1] The trial judge ruled that McElhanon's remedies under the UFCA were barred by the one year statute of limitations. (*See* trial judge's Memorandum Opinion and Order dated June 6, 1980). This question is not before us on appeal. We note however that in *Transamerica v. Trout,* ____ Ariz. ____, 701 P.2d 851 (App. 1985), the parties and this court assumed, based on prior Arizona authority, that the three-year statute of limitations applied to fraudulent conveyances. *See* A.R.S. § 12-543.

concerted action, accomplish some unlawful purpose or by unlawful means accomplish some purpose not itself unlawful. The term "unlawful" means not only criminal acts, but includes all willful, actionable violations of civil rights such as a fraudulent conveyance against a general creditor. The court noted that a conspirator, in this instance a bank, is not exonerated from liability because it may not have benefitted from the fraudulent conveyance. We therefore have concluded that a fraudulent conveyance against a judgment creditor is a legal wrong which may be the subject of a complaint for damages arising out of a conspiracy to commit a fraudulent conveyance.

Hing claims McElhanon's remedies were exclusively under the UFCA. The UFCA's remedies are set forth in A.R.S. § 44-1009 and in essence provide alternative rights: (1) The creditor may have the conveyance set aside, or (2) The creditor may disregard the conveyance and execute on or garnish the property in the hands of the fraudulent transferee.

In *Dalton v. Meister* the Wisconsin court further held that the plaintiff-creditor's remedies against the bank, which had helped the debtor to fraudulently transfer his assets, were not limited to those under the UFCA; the tort of conspiracy to commit a fraudulent conveyance entitled the plaintiff to money damages. We agree that the conspiracy is a cause of action apart from the UFCA and thus McElhanon is entitled to money damages.

However, the action for damages arising from conspiracy to commit a fraudulent conveyance is a remedy that should be used only where the remedies under the UFCA are inadequate. Such a situation may occur where the fraudulent transferee has subsequently transferred the property to a bona fide purchaser for value [*e.g., Transamerica v. Trout*, ____ Ariz. ____, 701 P.2d 851 (App. 1985)] or where the fraudulent transferee has allowed, or, as in this case, caused the fraudulently transferred property to substantially decrease in value.

We hold that the common law action for damages against a conspirator in a fraudulent conveyance is the value of the property fraudulently transferred or the amount of the debt, whichever is less. Our formulation of damages is similar to the result reached by courts exercising their powers in equity to award money damages against a fraudulent transferee:

> We turn next to the question of the propriety of the money judgment imposed by the trial court against the fraudulent transferee Genevieve H. Miller. It is the general rule that as long as the subject property remains in the possession of the fraudulent transferee in toto and is not depreciated by any action of the fraudulent transferee, a personal judgment against such transferee will not be sustained.
>
> However, under special circumstances it has nevertheless been held to be in equity's power to hold a fraudulent transferee personally liable. Such special circumstances generally involve some activity of the fraudulent transferee in causing the property involved to be depreciated in value while in his hands or causing the property, either wholly or in part, to be placed beyond the reach of the court. Equity in such event will not allow itself to be outwitted or frustrated. It has the power to and will go to the extent necessary to achieve equitable results. If a money judgment against the fraudulent transferee will accomplish the desired results, it will be imposed in favor of the judgment creditor. Such a judgment, however, by its very nature will be limited in amount to the loss in value of the subject property or if the property involved has been completely disposed of and beyond the reach of the court, the judgment will be limited to the full value of the property which would have oth-

> erwise been subject to the creditor's claim. Also, since such a personal judgment is to restore lost value in the property fraudulently conveyed, and is in lieu of returning this property fully to its prior ownership in the fraudulent transferor, the amount of this judgment when satisfied must be credited to the judgment claim.

Miller v. Kaiser, 164 Colo. 206, 213–14, 433 P.2d 772, 774–75 (1967) (citations omitted). *See also Damazo v. Wahby,* 269 Md. 252, 305 A.2d 138 (1973).

Hing claims that his acts as an attorney are privileged, unless he has engaged in malicious prosecution or abuse of process, which were not alleged. *Bird v. Rothman,* 128 Ariz. 599, 627 P.2d 1097 (App. 1981), *cert. denied* 454 U.S. 865 (1981); *Lewis v. Swenson,* 126 Ariz. 561, 617 P.2d 69 (App. 1980). We disagree with Hing's position that his capacity as an attorney shields him from liability for his alleged participation in a conspiracy involving a fraudulent conveyance. *Bird v. Rothman* recognized that attorneys could be liable for the intentional torts of malicious prosecution and abuse of process, although in that case the facts did not support a claim for either. The privilege an attorney has for his actions in representing a client is a qualified one that does not extend to the intentional torts of malicious prosecution and abuse of process. Nor should the privilege apply to the intentional acts of furthering and participating in a fraudulent conveyance. We note that encouraging a fraudulent conveyance resulted in disciplinary action against an attorney in *Townsend v. State Bar,* 32 Cal. 2d 592, 197 P.2d 326 (1948).

Evidence of Fraud by Hing

We must now turn to Hing's role in these events to determine whether he was a conspirator. From our review of the record we determine that there was sufficient evidence to support a finding that Hing participated in a con-

spiracy to fraudulently hinder and delay McElhanon as a judgment creditor in the collection of his judgment against Harris, and that, as a result, McElhanon suffered damage. The circumstantial evidence strongly indicates that Hing drafted the stock transfer agreement and participated in the transfer discussion, knowing that Harris was or would be rendered insolvent, knowing that Greer was financially unstable if not insolvent, knowing that the consideration was inadequate and that the stock transfer agreement itself was a sham, and with the actual intention on Hing's part of hindering, delaying, and defrauding McElhanon. Additionally, based upon the delay occasioned by Hing's acts and those of his co-conspirators, including the looting of the corporation by the co-conspirators, the value of the stock subsequently decreased so as to give rise to a cause of action for money damages by McElhanon against the fraudulent transferee, Greer, and vicariously against Hing who was a co-conspirator, relating to the original unlawful act, the fraudulent transfer.[2] We do believe that Hing's legal pleadings in cause no. 249999, subsequent to the fraudulent conveyance, were circumstantial evidence of his knowing participation along with Harris and Greer in wrongfully attempting to delay the defrauded judgment creditor, McElhanon. In and of themselves, these subsequent filings were not actionable, but they were material in establishing that the fraudulent transfer was a proximate cause of the subsequent diminution in value of the stock. Certainly, if it is assumed that Hing did not knowingly participate in the fraudulent conveyance transaction, Hing's subsequent actions could not have resulted in a claim against him. Likewise, as recognized by both the trial judge and McElhanon, the mere showing of the fraudulent transaction and Hing's knowing participation therein, would not alone

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[2] We need not determine that there was substantial evidence to indicate that Hing was involved in any other conspiracy with Greer and Harris, nor that he had any knowledge of Greer and Harris's looting of the corporation of its assets, nor that he had any plan to gain control of the corporation for his own purposes.

have entitled McElhanon to assert any claim for damages against Hing. In such an event, McElhanon's recourse would have been to assert an appropriate remedy against the fraudulently transferred property pursuant to the UFCA. *See* A.R.S. § 44-1009 and *supra,* slip op. at 14. Before any claim could be asserted against Hing, McElhanon had to show that because of the delay occasioned by the unlawful transfer and the acts of the conspirators the value of the stock decreased to the detriment of the plaintiff. Hing admits that he prepared the October 13th conveyance agreement and he admits the filing of various pleadings to reverse the trial court's decision in cause no. 249999 and to stay enforcement of the judgment therein.

Hing raises one further argument as to the sufficiency of the evidence. This contention relates to the use of circumstantial evidence to establish the existence of a conspiracy. Although he agrees that in general on a challenge to the sufficiency of the evidence, all evidence must be taken in the light most favorable to the appellee who is entitled to all reasonable inferences, Hing claims that in a conspiracy case this rule as applied to circumstantial evidence is limited. Hing relies on *O'Brien v. Larson,* 11 Wash. App. 52, 521 P.2d 228 (1974) in which the appellate court affirmed the trial court's dismissal of a conspiracy charge holding that the alleged acts were not inconsistent with a lawful or honest purpose.

> While it is recognized that a conspiracy may be, and usually must be, proved by acts and circumstances sufficient to warrant an inference that the defendants have reached an agreement to act together for the purpose alleged, the test of the sufficiency of the evidence is that the facts and circumstances relied upon to establish the conspiracy must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy.

11 Wash. App. at 55–56, 521 P.2d at 231, quoting *Baun v. Lumber & Sawmill Workers, Local 2740,* 46 Wash. 2d 645, 284 P.2d 275 (1955). *See also, Dill v. Rader,* 583 P.2d 496 (Okla. 1978) (evidence must lead to belief); *Tribune Co. v. Thompson,* 342 Ill. 503, 174 N.E. 561 (1930) (evidence must be clear and convincing that circumstances are more consistent with guilt than with innocence).

We reject this suggested limitation on the weight to be given circumstantial evidence. In *State v. Harvill,* 106 Ariz. 386, 476 P.2d 841 (1970) the Arizona Supreme Court thoroughly discussed and overruled its prior opinions regarding the weight to be accorded circumstantial evidence, and held that the probative value of direct evidence and circumstantial evidence were intrinsically similar, and that even though the burden of proof in the case before it was beyond a reasonable doubt, the trial court did not err in instructing the jury that the law makes no distinction between circumstantial and direct evidence. Accordingly, we find no error on this issue.

Jury Instructions

Hing first states that the trial court erred in not instructing the jury on the traditional nine elements of fraud. *Staheli v. Kauffman,* 122 Ariz. 380, 595 P.2d 172 (1979); *Wilson v. Byrd,* 79 Ariz. 302, 288 P.2d 1079 (1955). Instead the court gave the following instruction, over objection, as to the elements of the plaintiff's case:

> The elements of conspiracy to delay, hinder and defraud a judgment creditor are as follows:
>
> (1) An unlawful agreement;
>
> (2) With the specific intent of each member of the conspiracy to hinder, delay and defraud a judgment creditor;

(3) Acts committed pursuant to the unlawful agreement; and

(4) Damages caused by the acts committed pursuant to the unlawful agreement.

Hing complains that this instruction creates a rule of law that any attorney who advises a debtor as to a conveyance which may somehow hinder a creditor from collecting a debt will be liable to the creditor if the transaction is ultimately found to be a fraudulent conveyance. He also complains that "unlawful," "hinder," "delay" and "defraud" were not defined for the jury. Hing's complaints are without merit. This was not an action for fraudulent misrepresentation, and the trial court did not err in refusing an instruction relating to fraudulent misrepresentation. The jury was instructed that intent to defraud was an element of the plaintiff's claim and that it must be proven by clear and convincing evidence. The jury was also advised of the elements of a claim for conspiracy to hinder, delay or defraud a judgment creditor and that fraud is an action "of an affirmative evil nature, such as proceeding or acting dishonestly, intentionally, maliciously, and deliberately, with a wicked motive, to cheat or deceive one party, which results in that party's damage or loss." In view of these instructions we hold that the jury was adequately advised of the nature of the fraudulent intent which must be proven in order to find Hing liable.

As to Hing's claim that the court did not define the term "unlawful," his brief does not give us a specific citation to the record indicating that objection was made to this instruction on this ground nor have we noted in the record any request for an instruction concerning the meaning of "unlawful." Accordingly, any objection to the failure to define "unlawful" has been waived. *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 693 P.2d 348 (App. 1984).

Hing also appears to argue that under the UFCA, many acts are defined as fraudulent without regard to

actual fraudulent intent. From this premise he infers that the court's instructions would have allowed a finding of liability on Hing's part based solely on a violation of the constructive fraud sections of the UFCA and without a showing of actual fraudulent intent. We reject this contention. When the instructions are read and considered as a whole it is clear that the jury was properly instructed as to the necessity of a finding of actual fraudulent intent on Hing's part.

Hing's next contention is that the court gave misleading instructions "as to the effect of a 'conspiracy' among the defendants." The instruction complained of was in part as follows:

> There is no cause of action for an agreement to cause damage by unlawful means, unless in furtherance of such an agreement, unlawful acts are committed, and damage results from the acts.

Hing's objection is technically correct, since when considered alone the instruction does imply that there is a cause of action for conspiracy. We find no prejudice, however, since it is clear that the jury was correctly instructed that no liability could be found based upon conspiracy alone, and that liability must be based on damages resulting from an unlawful act committed pursuant to the conspiracy.

We have considered the remaining instruction issues raised by Hing and find no error.

Inclusion of Greer in the Action

Although Harris, the party from whom the stock was transferred, was not named as a party to this action, Greer, the party to whom the stock was transferred, was named as a party. Greer did not answer the complaint nor did he appear at any hearings or depositions in person or through counsel. Greer filed a bankruptcy petition in October, 1976

resulting in an automatic stay of all actions against him. At the time of trial the stay had been lifted and the defendants filed a motion to try the Greer case separately. The motion was denied. Although the court stated it would direct a verdict against Greer, McElhanon proceeded to trial with Greer as a defendant. Evidence was offered and received against Greer which Hing complains was improper, irrelevant and prejudicial as to Hing. Hing claims the trial court erred in refusing to separate the trials.

Under rule 42(b), Arizona Rules of Civil Procedure, "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or of any . . . issue." Whether to grant a motion for separate trial is within the trial court's discretion. *Morley v. Superior Court,* 131 Ariz. 85, 638 P.2d 1331 (1982). We do not find that the trial judge abused his discretion.

Misconduct of McElhanon's Counsel

The remaining issues in the appeal are all based on allegations of misconduct of McElhanon's counsel, Jack E. Evans (Evans). We must consider each allegation individually as well as the totality of these allegations.

I. Counsel's Opening Statement.

Hing complains first that even though the trial court had consistently ruled it was inadmissible, Evans, in his opening statement referred to the judgment in bankruptcy court that the transfer from Harris to Greer was fraudulent. In a previous memorandum decision of this court, *Hing v. Southwest Restaurant Systems, Inc.* (1 CA-CIV 4058 filed March 1, 1979) we held that the bankruptcy court's findings were not res judicata or barred by collateral estoppel against Hing and that Hing would have the right to contest those issues at trial in state court. McElhanon's position is that reference to the bankruptcy court's judgment was admissible against Greer and Hing. Specifically as to Hing,

McElhanon states that no prejudice resulted since Hing has not attacked any of the evidence, ruling or instructions regarding the fraudulent conveyance.

The jury was given the standard instruction that arguments of counsel are not evidence and should not be regarded as such. Prior to trial, however, Hing and Grace had filed a motion in limine on this issue. Following a hearing the trial court ruled the findings of fact and conclusions of law of the bankruptcy court were inadmissible as a matter of law against Hing and Grace. Nevertheless, in opening statement Evans stated:

> First, the bankruptcy court said, 'Let's find — let's dispose of this transfer between Harris and Greer. Let's have a trial.' And they had a trial.
>
> And, after that trial, the bankruptcy court said, 'That sale is fraudulent. It was made to hinder, delay and defraud this man's judgment. Mr. Greer's promise was worth nothing. It was made when Mr. Harris was insolvent. Mr. Greer was insolvent. The whole things [sic] was fraudulent.'

An objection was made and sustained. However Evans immediately emphasized the point by stating:

> Going forward, the bankruptcy court determined that the transfer from Harris to Greer was fraudulent and said, 'Greer doesn't own that stock. Harris owns it.'

Throughout the trial other references were made to the bankruptcy judgment, objections to which were also sustained. Evans offered the judgment in evidence but objections to the document were sustained. Evans again referred to the bankruptcy court's judgment in his closing argument.

McElhanon takes the position that Greer and Grace were collaterally estopped to deny the findings of fact and conclusions of law of the federal court in the bankruptcy case, and therefore these were admissible against them. McElhanon states in his answering brief that, "It was error for the trial court to rule that the jury was to ignore counsel's remarks in his opening statement regarding the bankruptcy court's judgment." McElhanon has not properly designated this as a "cross-issue" on appeal. *Santanello v. Cooper,* 106 Ariz. 262, 475 P.2d 246 (1970); Arizona Appellate Handbook § 3.2.2. Because McElhanon has not properly raised this question on appeal through the appropriate mechanism of cross-assignment of error we decline to consider whether the trial court's ruling on the motion in limine was correct. *DeLozier v. Smith,* 22 Ariz. App. 136, 524 P.2d 970 (1974).

McElhanon states that, assuming it was improper for counsel to mention the bankruptcy proceedings, no prejudice flowed to Hing. The trial court properly instructed the jury regarding the remarks of counsel. McElhanon then states that since Hing has not attacked any of the evidence, rulings, or instructions regarding the fraudulent conveyance finding in the bankruptcy action, Hing cannot be prejudiced by reference to the federal bankruptcy court proceedings. Hing replies that this position is incredible in view of the earlier decision by this court in a special action:

> [W]e cannot agree that the finding of fraudulent conveyance as an underlying fact constituted a conclusive determination of status capable of being wielded against a party taking no part in the earlier proceedings.

Hing v. Southwest Restaurants Systems, Inc., slip op. at 4. That ruling was followed by the superior court's order dated May 23, 1980 which was for the benefit of both Hing and Grace.

It is clear from the record and procedural history of the case that Evans acted improperly in referring to the bankruptcy court judgment and in attempting to introduce it into evidence. We believe it is also arguable that these actions were prejudicial to Hing. Hing characterizes them as an attempt to tar him with Greer's crimes and misconduct. Following the improper references in McElhanon's opening statement, Hing moved for a mistrial. The trial judge after hearing argument on the motion said:

> I think it can be cured.
>
> * * *
>
> What I would propose to do is advise the jury, prior to the resumption of opening statements, that Mr. Evans referred to a ruling by another Judge in a totally separate proceeding; that ruling has no relevance to this action against Mr. Hing and Mr. Grace and has no binding affect [sic] on this jury or this Court.

Following argument the trial court denied the motion for mistrial. Thereafter Hing asked for a stay in order to file a special action regarding the denial of the motion for mistrial. The trial court denied the stay. The petition for special action was filed with this court which declined to accept jurisdiction [*Hing v. Superior Court/Derickson/McElhanon,* 1 CA-CIV 5457 (1980)]. Following the denial of the motion for mistrial the trial court prepared a curative instruction which was then given to the jury as follows:

> I will tell you that from time to time it becomes necessary to take up certain legal matters and all I can tell you is that, in the future, we will seek very carefully to confine our discussions about legal matters to the periods of time after, ordinarily, we are ready to proceed in court with the jury presentation. If you have any burning desire — any of you — to hold the fact of the delay against anyone,

please hold it against me and not the parties to this litigation.

In opening statement yesterday, Mr. Evans may have inadvertently referred to a ruling by another Judge in another proceeding with respect to the validity of the stock transfer. Whatever the ruling was, it has no binding effect as to either Mr. Hing or Mr. Grace with respect to the court issues now on trial; that is, whether Mr. Hing and/or Mr. Grace unlawfully conspired to defraud Mr. McElhanon of his rights as a judgment creditor.

By this statement to you, I do not mean to suggest that Mr. Evans has done anything intentionally improper, nor should you hold it against him or his client. As I stated before, opening statements are solely for the purpose of giving you an overview of what each party intends and hopes to prove through the testimony of witnesses and the admission of exhibits. Opening statements are not evidence and you may base your verdict only upon the evidence that is presented in court and the instructions of law which I will give you at the end of the case and on no other basis.

These instructions, which I gave you yesterday and what I have told you now, apply to all the parties in this case.

Following this and despite the trial court's repeated rulings, Evans, completely undaunted, moved to admit into evidence the findings of fact and conclusions of law of the federal bankruptcy court. The trial judge sustained Hing's objection to the document. Evans doggedly continued to bring up the matter and specifically mentioned it again in closing argument. Hing again moved for a mistrial and the motion was denied. The trial court in that regard said, "I

don't find the passing reference to it as fundamental error or prejudicial error to the Defendants Hings or Defendants Grace."

The question we must answer is whether the trial court abused its discretion in denying these motions for mistrial. "The grant or denial of a motion for new trial on the ground of misconduct is a matter within the trial court's discretion; in exercising that discretion, the trial court must decide whether the misconduct has materially affected the rights of the aggrieved party." *Grant v. Arizona Public Service Co.*, 133 Ariz. 434, 454, 652 P.2d 507, 527 (1982). The case holds that in order to reverse a denial of a mistrial it must be clearly established that the misconduct actually influenced the verdict; the defendants failed to meet this standard in *Grant* so there was no abuse of discretion. *See also* rule 61, Arizona Rules of Civil Procedure.

The trial court in the case before us found that the passing references were not prejudicial error as to Hing. It is our task only to determine if that finding by the trial court was an abuse of discretion even though we find the conduct to be improper and to constitute misconduct of counsel. To determine this we consider the guidelines set forth in *Grant v. Arizona Public Service:*

1. Whether there has been an error of law committed in the process of reaching the dicretionary [sic] conclusion.

2. Whether the discretionary conclusion was reached without consideration of the evidence.

3. Whether other, substantial error of law has occurred as part of or in addition to the misconduct.

4. Whether our review of the record convinces us that there is no substantial basis for the trial court's discretionary holding.

Applying the above criteria we cannot say there was an abuse of discretion as to this issue even though the conduct of counsel was deplorable. A mistrial is never granted as a disciplinary measure but only to prevent a miscarriage of justice. *Grant v. Arizona Public Service; Zugsmith v. Mullins,* 86 Ariz. 236, 344 P.2d 739 (1959).

II. The Ex Parte Conference.

During the trial in chambers with all attorneys present, Evans and the trial judge discussed the propriety of Evans reading from portions of deposition transcripts. Evans was concerned that the judge was angry at him and that the judge had conveyed that anger to the jury. In chambers Evans stated:

> If you want to bring me in here at anytime and dress me down, I will be here and I recognize the court's authority in that regard, but in front of the jury just tears me up.

There followed a long and heated conversation between the trial judge and Evans who apparently threw some files or papers and said:

MR. EVANS: As the record will indicate, the Court believes I have been guilty of misconduct in the presentation of this case, Harvey [McElhanon].

THE COURT: If the record indicates that, I will accept whatever.

MR. EVANS: Harvey, he believes I have misrepresented the facts in this case to the court and the jury. So we will talk about it.

THE COURT: I am not going to say that's what I believe, but we will talk about it.

MR EVANS: Let's go, Harvey.

The next day the record begins as follows: "(Whereupon the following took place in chambers.)" The only persons present were the trial judge, the court reporter, Evans and McElhanon. The judge stated, "This is a conference with Mr. Evans, Mr. McElhanon and the court with respect to certain things that came up yesterday afternoon." An effort by the trial judge to defuse the anger from the previous day was followed by allegations of perjury and subornation of perjury made by both McElhanon and Evans against the attorney defendants in the case, Grace and Hing. They also discussed with the judge whether the judge was going to declare a mistrial based on the conduct of Evans. The *ex parte* hearing ended with a request by Evans that the judge report the "perjured" testimony of the attorney defendants to the bar association and to the county attorney for prosecution.

Later that day the court reporter's notes of this hearing were read to the other counsel. Following that reading, counsel for one of the defendants requested that the trial judge disqualify himself on the basis of judicial misconduct and the Code of Judicial Conduct Canon 3 Parts (C)(1) and (D), rule 45, Arizona Rules of the Supreme Court. (Now renumbered rule 81, effective February 1, 1985). Following a lengthy discussion on the record, the trial judge granted the motion for mistrial. Thereafter Evans made a lengthy and impassioned objection to the granting of the mistrial. The trial judge then ruled as follows, "I am going to take

back what I said before. I am going to deny the motion for mistrial." The trial then resumed.

On the basis of these proceedings we must reverse this case. We believe that at this point the trial judge lost control of the case and there could no longer be a fair and impartial trial. We are guided in doing do by our supreme court in *Grant v. Arizona Public Service:*

> We are urged to follow a line of cases which hold that prejudice must be presumed even when it cannot be demonstrated because the trial court failed to admonish the jury to disregard the misconduct. These cases, however, were situations in which, for one reason or another, the trial court seems to have lost control over the entire trial, so that the reviewing court must conclude that the trial proceedings were a virtual mockery of the concept of a fair and impartial trial. In *Love v. Wolf,* 226 Cal.App.2d 378, 38 Cal. Rptr. 183 (1964), the appellate court detailed counsel's misconduct from opening statement through final argument, characterizing the misconduct as "egregious beyond any in our experience or that related in any reported case . . . ." *Id.* at 382, 38 Cal. Rptr. at 184. The court found the trial judge's "loss of . . . control" of the case "very puzzling." *Id.* at 391, 38 Cal. Rptr. at 190. *See also Simmons v. Southern Pacific Transportation Company,* 62 Cal.App.3d 341, 144 Cal.Rptr. 42 (1976). Our review of this record does not permit the conclusion that the trial judge "lost control" of the case, nor that the court permitted counsel to engage in conduct which precluded a fair trial. Hopefully such a case will not arise; if it does come before us, we shall hve no hesitancy in finding that denial of a motion for a new trial was an abuse of discretion.

133 Ariz. at 456, 652 P.2d at 529.

We are also influenced in our decision by the Code of Judicial Conduct, Canon 3(A)(4), rule 81, Arizona Rules of the Supreme Court, which provides, "A judge should . . . neither initiate nor consider *ex parte* applications concerning a pending or impending proceeding." A rule of professional responsibility provides that, in the absence of opposing counsel, a member of the bar should neither communicate with nor argue to a judge except in open court upon the merits of a contested matter pending before that judge. DR 7-110, Code of Professional Responsibility, rule 29(a), Arizona Rules of the Supreme Court. *See also* ER 3.5, Rules of Professional Conduct, rule 42, Arizona Rules of the Supreme Court, effective February 1, 1985; *Heavey v. State Bar,* 17 Cal. 3d 553, 131 Cal. Rptr. 406, 551 P.2d 1238 (1976); *In Re Berk,* 98 Wis. 2d 443, 297 N.W. 2d 28 (1980). We conclude that it is without question that the *ex parte* communications were about the merits of the litigation. McElhanon and Evans clearly impugned the credibility of the opposing parties and their testimony as well as the credibility of their witnesses.

McElhanon relies on Canon 3(A)(4) of the Code of Judicial Conduct which reads as follows:

> A judge should . . ., except *as authorized by law,* neither initiate nor consider *ex parte* applications concerning a pending or impending proceeding. [emphasis added]

McElhanon claims that the judge was "authorized by law" to hear an allegation of perjury or an allegation of attorney misconduct. Clearly what occurred in this case is not what was intended by the phrase "except as authorized by law." Certain *ex parte* proceedings are set forth by statute or rule and are therefore "authorized by law." *See, e.g.,* The Bankruptcy Code, 11 U.S.C.A. § 1 *et seq.;* A.R.S. § 14-3301 *et seq.; In Re Jordan,* 293 Or. 788, 652 P.2d 1268 (1982); A.R.S. § 12-213(A); rule 65(d), Arizona Rules of Civil Procedure.

McElhanon's claim that his *ex parte* communication with the judge was authorized by law is entirely without merit for not only was it *not* authorized, it totally destroyed the sanctity of a fair trial. Even if we were to accept the contention that it was authorized by law it went beyond the mere reporting of an allegation of perjury. The judge asked McElhanon and Evans for suggestions on what to do about the allegations and suggestions were given.

We are mindful of the obligations under DR 1-103 of the Code of Professional Responsibility, rule 29(a), Rules of the Supreme Court, which states:

> (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 [attorney misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
>
> (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

(Rule deleted, effective February 1, 1985; *see* ER 8.3(A) Rules of Professional Conduct, rule 42, Rules of the Supreme Court). However, there were several authorities to whom McElhanon and Evans could have reported the alleged violations other than the judge then presiding over the ongoing trial. Furthermore that judge was not "empowered to investigate or act upon such violation[s]" as long as he continued to preside over the trial in which the alleged violations occurred. The fact that Evans engaged in the *ex parte* proceeding unquestionably constituted misconduct on his part. DR 7-110(B), rule 28, Rules of the Supreme Court, now ER 3.5(b), rule 42, Rules of the Supreme Court. As to whether the impropriety of this *ex parte* proceeding affected the out-

come of the trial, we note that before this proceeding the trial judge had stated that there was not sufficient evidence of a prima facie case to take the issue of punitive damages to the jury. After that conference, the trial judge reversed himself and allowed the issue of punitive damages to go to the jury.

For all of the above reasons the case must be reversed and remanded for a new trial.

Because we have determined to reverse, we need not consider the final issue raised in the opening brief which deals with prejudicial statements by McElhanon and the introduction of inadmissible evidence against Hing. With proper control these matters should not arise in any retrial of this case.

Cross-Appeal

MAY A JUDGMENT CREDITOR RECOVER DAMAGES IN EXCESS OF HIS JUDGMENT PLUS INCIDENTAL COSTS AS A RESULT OF A CONSPIRACY TO HINDER HIM FROM COLLECTING THE JUDGMENT?

McElhanon, in this cross-appeal, claims Hing's liability is not limited to the original $200,000 judgment obtained by McElhanon against Harris but extends to the entire loss which was the natural and probable consequence of any of the conspirator's wrongful acts. McElhanon claims that all of the conspirators knew that Harris could not pay the $200,000 judgment and that the only valuable right owned by McElhanon was the right to acquire Harris's stock in the restaurant corporations. The alleged purpose of the conspiracy was to prevent McElhanon from acquiring control of the restaurant corporations.

McElhanon offers two theories for holding Hing liable for all of the damages suffered. The first theory is that the damages are the direct consequence of Hing's continuing efforts to defeat McElhanon's rights to foreclose his post

judgment garnishment lien on Harris's stock. The second theory arises from the liability imposed on a conspirator. McElhanon relies on the findings and judgment from the federal bankruptcy proceedings to claim damages based on Greer's and Harris's use of Southwest's assets to pay personal debts. None of these losses would have occurred had it not been for the conspiracy, alleges McElhanon. In October, 1975, McElhanon paid $1.1 million to acquire all of the stock in Southwest; therefore, he claims his minimum loss is two-thirds of $1.1 million as McElhanon would have owned two-thirds of the stock in October, 1973 but for the conspiracy. McElhanon's legal position is that a wrongdoer is liable for any injury which is the direct and proximate consequence of his wrongful acts. *Valley Nat'l Bank v. Brown,* 110 Ariz. 260, 517 P.2d 1256 (1974).

Hing responds that there is no evidence that Harris could not pay the $200,000 judgment, nor that he could not post an acceptable supersedeas bond. We agree with Hing that many of the factual statements made by McElhanon in relationship to the cross-appeal are not supported by the evidence. Furthermore McElhanon's theory of damages is founded on certain assumptions not proved in this lawsuit.

We hold that the amount of damages to which McElhanon would be entitled is limited to the amount of the debt which was made uncollectable plus incidental expenses. Any other damages are speculative and therefore not recoverable. *Higgins v. Guerin,* 74 Ariz. 187, 245 P.2d 956; *Moody v. Burton,* 27 Me. 427 (1847); *Klaus v. Hennessey,* 13 R.I. 332 (1881). In so holding we follow other courts which have allowed recovery of money *proceeds* from a grantee but have held there is no right to recover money *damages. Findlay v. McAllister,* 113 U.S. 104, 5 S.Ct. 401, 28 L. Ed. 930 (1884); *James v. Powell,* 25 App. Div. 2d 1, 266 N.Y.S. 2d 245 (1966); *see* Note, *Tort Liability for Fraudulent Conveyance,* 19 Stan. L. Rev. 636 (1967). *See also Transamerica v. Trout* (judgment creditor, in garnishment proceedings recovered proceeds of sale to bona fide purchaser for value

from fraudulent transferee). We affirm the trial court's limiting of damages to the amount of McElhanon's judgment in the previous lawsuit plus incidental costs.

Summary

By holding herein that McElhanon has a valid claim for damages arising from conspiracy to defraud a judgment creditor by which he may recover money damages against Hing we have also determined that such a cause of action has the following required elements:

1. The plaintiff must be a judgment creditor.

2. The party against whom damages are claimed must be guilty of actual fraud, as opposed to constructive fraud. That is, he must know that the transfer will leave the debtor insolvent, that the transfer is for less than fair value, and that the purpose of the transfer is to hinder, delay, or defraud the judgment creditor-plaintiff.

3. Before the defendant can be found liable for money damages there must be a showing that the remedies directly provided by the UFCA are inadequate, i.e., that the fraudulently transferred property is no longer in the hands of the fraudulent transferee, or that by reason of the delay or some other reason resulting from the fraudulent transfer, the property has lost its value or has substantially decreased in value.

4. Damages are limited to the amount of the judgment creditor's judgment or the value of the property at the time of transfer, whichever is less along with incidental expenses. Damages, therefore, are not speculative.

Having recognized the cause of action as described we reverse this case due to the misconduct of court and counsel in holding an *ex parte* proceeding and remand the case for new trial or proceedings consistent with this opinion.

SARAH D. GRANT,
Presiding Judge

CONCURRING:

WILLIAM E. EUBANK, Judge

EINO M. JACOBSON, Judge

NOTE: The issuance of the court's opinion in this appeal has been delayed because of Judge L. Ray Haire's decision, based upon events occurring after the submission of the appeal to the court, to disqualify himself from further participation in the proceeding.

Judge Jacobson has been assigned by the Chief Judge to serve in place of Judge Haire.

April 23, 1986

RE: HARVEY R. McELHANON, JR. et ux vs. ROBERT ONG HING et ux
Supreme Court No. CV-86-0128-PR
Court of Appeals No. 1 CA-CIV 5933
Maricopa County No. C-320360

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 22, 1986, in regard to the above-referenced cause:

"ORDERED: Petition for Review [Plaintiff-Appellees McElhanon] = GRANTED as to issue 1.

FURTHER ORDERED: Appellants' Petition for Review = DENIED."

Petitioners' [Appellees McElhanon] filing fee in the amount of $25.00 and Respondents' [Appellants Hing] filing fee in the amount of $15.00 should be remitted within fifteen days.

The Clerk of the Court of Appeals, Division One, shall forward the record to the Clerk of the Supreme Court.

DAVID R. COLE, Clerk

TO:

Jack E. Evans, Esq., Jack E. Evans, Ltd.
Donald Daughton, Esq., Allen L. Feinstein, Esq., and R. Stewart Halstead, Esq., Daughton, Feinstein & Wilson
Hon. B. Michael Dann, Judge, Maricopa County Superior Court
Vivian Kringle, Clerk, Maricopa County Superior Court
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix

SUPREME COURT OF ARIZONA

HARVEY R. McELHANON, JR., and DOREEN T. McELHANON, his wife,	
Plaintiffs-Appellees and Cross-Appellants,	Supreme Court No. CV-86-0128-PR
vs.	Court of Appeals No. 1 CA-CIV 5933
ROBERT ONG HING and ALICE HING, his wife,	Maricopa County No. C-320360
Defendants-Appellants and Cross-Appellees.	ORDER

The Court having read Defendants-Appellants' Motion for Supplementation of Briefs and for Oral Argument, the Response, and the Reply to the Response,

IT IS ORDERED that the Motion for Supplementation of Briefs is granted.

IT IS FURTHER ORDERED that the supplemental briefs shall be directed to the following issues:

1. Did the client participate in the misconduct involving *ex parte* contact with the trial judge? If so, how?

2. Did the misconduct influence the verdict? If so, how?

3. If the misconduct is attributable only to the lawyer, and if it was not calculated to affect the verdict, why is reversal an appropriate remedy?

IT IS FURTHER ORDERED that the supplemental brief shall be limited to thirty (30) pages in length. Specific references to the record are required in connection with all assertions of fact.

IT IS FURTHER ORDERED that Defendants-Appellants' Supplemental Brief shall be filed within 20 days of the date of this order.

IT IS FURTHER ORDERED that Plaintiffs-Appellees' Supplemental Brief shall be filed within 20 days after Defendants-Appellants' Supplemental brief is filed.

IT IS FURTHER ORDERED that the Motion for Oral Argument is denied.

DATED this 29th day of May, 1986.

WILLIAM A. HOLOHAN
Chief Justice

December 19, 1986

RE: HARVEY R. McELHANON, JR. et ux vs. ROBERT ONG HING et ux
Supreme Court No. CV-86-0128-PR
Court of Appeals No. 1 CA-CIV 5933
Maricopa County No. C-320360

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 16, 1986, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration = DENIED.

Mandate enclosed.

DAVID R. COLE, Clerk

TO:

Allen Feinstein, Esq. and R. Stewart Halstead, Esq.,
Rawlins Burrus Lewkowitz & Feinstein
Jack Evans, Esq., Jack E. Evans, Ltd.

pr

SUPREME COURT OF ARIZONA

HARVEY R. McELHANON, JR., and DOREEN T. McELHANON, his wife,	)	
Plaintiffs-Appellees Cross-Appellants,	)	Supreme Court No. CV 86-0128 PR
vs.	)	
ROBERT ONG HING and ALICE HING, his wife,	)	MANDATE
Defendants-Appellants Cross-Appellees.	)	

TO: The Honorable Superior Court for Maricopa County, Arizona, in relation to Cause No. C-320360.

GREETINGS:

The above cause was presented in your Court and was brought before the Court of Appeals, Division One, No. 1 CA-CIV 5933, in the manner prescribed by law. That Court rendered its Opinion and caused the same to be filed on the 1st day of October, 1985.

A Petition for Review was granted by this Court on the 22nd day of April, 1986. This Court rendered its Opinion and caused the same to be filed on the 3rd day of November, 1986.

A Motion for Reconsideration was timely filed and was denied by Order of this Court on the 16th day of December, 1986.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the Opinion of this Court, a copy of the Opinion being attached hereto.

WITNESS, THE HONORABLE WILLIAM A. HOLOHAN, Chief Justice of the Supreme Court of the State of Arizona, this 19th day of December, 1986.

DAVID R. COLE, Clerk

COSTS OF APPELLEES, CROSS-APPELLANTS McELHANON

Filing Fees	$ 40.00
Copying and Binding of Briefs	$525.95
TOTAL	$565.95

McELHANON vs. HING
Arizona Supreme Court No. CV-86-0128-PR
Court of Appeals No. 1 CA-CIV 5933
Maricopa County No. C-320360
MANDATE
Page 2 of 2

TO:

Allen L. Feinstein, Esq. and R. Stewart Halstead, Esq., Rawlins Burrus Lewkowitz & Feinstein
Jack E. Evans, Esq., Jack E. Evans, Ltd.
Hon. B. Michael Dann, Presiding Judge, Maricopa County Superior Court
Gordon W. Allison, Maricopa County Court Administrator
Glen D. Clark, Clerk, Court of Appeals, Division One
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File Number S-0044-002
Attorneys for Defendants-Appellants and Cross-Appellees

SUPREME COURT
STATE OF ARIZONA

HARVEY R. McELHANON, JR., and DOREEN T. McELHANON, his wife,	Court of Appeals No. 1 CA-CIV 5933
Plaintiffs-Appellees and Cross-Appellants,	Maricopa County Superior Court No. C 320360
vs.	
ROBERT ONG HING and ALICE HING, his wife,	MOTION FOR RECONSIDERATION
Defendants-Appellants Cross-Appellees.	

Defendants-appellants Hing respectfully move this Court to reconsider its decision filed November 3, 1986, on the grounds set forth in the accompanying memorandum.

RAWLINS BURRUS LEWKOWITZ & FEINSTEIN, P.C.

Allen L. Feinstein
R. Stewart Halstead

Attorneys for Defendants-Appellants and Cross-Appellees

Memorandum

I. The Effect of this Court's Opinion is to Deny Appellants Their Right to an Appellate Review of the Decision Against Them.

The Court of Appeals opinion did not consider numerous claims of error raised by appellants Hing in their brief. The Court of Appeals opinion stated: "Because we have determined to reverse, we need not consider the final issue raised in the opening brief which deals with prejudicial statements by McElhanon and the introduction of inadmissible evidence against Hing. With proper control these matters should not arise in any retrial of this case." (Court of Appeals opinion, p. 36).

These issues are discussed at pages 60–70 of appellants' opening brief. They concern serious and extremely prejudicial statements by McElhanon and the improper introduction of evidence against Hing. This Court's opinion does not deal with those issues and the Court of Appeals specifically did not rule on those issues. The effect of this Court's opinion affirming the trial court's verdict is to deny Hing's rights to an appellate review. Arizona Revised Statutes, section 12-2101.*

This Court should reconsider its opinion and remand the case to the Court of Appeals so that it may make a determination as to the effect of these errors by the trial court on the verdict.

II. The Court's Opinion has Sanitized the Proceedings Below.

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* The failure to rule on these issues also violates Hing's right to due process. Where the right of appeal is granted by law, constitutional due process requires that it be exercised in a nondiscriminatory manner. *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 75 S. Ct. 92, 99 L. Ed. 46 (1954).

This Court's opinion minimizes and does not accurately reflect the extent of the misconduct or the errors at the trial court level.

This Court dismisses the severe prejudice and error created by Mr. Evans' continual reference to the Bankruptcy Court ruling by stating:

> "Whatever the extent of the impropriety in Evans's references to the bankruptcy proceeding, that impropriety presumably was rendered harmless when the judgments in bankruptcy were subsequently admitted in evidence." (Slip op. at 8, n. 3)

In fact, the orders regarding the transfer (Exhibits 155 and 157) were never admitted into evidence. McElhanon attempted to argue on appeal that the trial court was in error in not admitting them, but the Court of Appeals held he had not properly preserved this issue (Court of Appeals opinion, pp. 25–26).

Evans on numerous occasions waved the rulings in front of the jury stating that another court had previously determined that fraud was involved in this case. This conduct was before the jury and was clearly prejudicial to Hing in that his counsel was repeatedly forced to object to the reference to the findings and Evans was consistently permitted to claim that another *court* had already determined, "that sale is fraudulent. It was made to hinder, delay and defraud this man's judgment. Mr. Greer's promise was worth nothing. It was made when Mr. Harris was insolvent. Mr. Greer was insolvent. The whole things [sic] was fraudulent." (Transcript, Vol. II, p. 134).

As to the ex parte conference, there is no showing in the record that there was any realistic opportunity for defendants to object to it. There can also be no question that its scope certainly exceeded the bounds of propriety. The meeting was not a trivial or unimportant occurrence. As

held by the Court of Appeals, "it totally destroyed the sanctity of a fair trial." (Court of Appeals opinion, pp. 34–35).

This Court is incorrect in stating that the trial court stated that it was "inclined" to grant the motion for the mistrial. The trial court actually stated: "I am going to grant a motion for mistrial. I am going to turn this matter over to the presiding judge for a reassignment on Monday. I have asked Judge Strand to make every effort to provide a judge who has had no prior relationship to this case in any way and who, hopefully, will have a calendar that will accommodate you all and that the matter be set for trial as quickly as possible." (Transcript, Vol. XVIII, p. 46).

This Court states that the trial judge,

> "In his efforts to remain neutral, he [the trial judge] even consulted the presiding judge, a completely proper course of conduct." (Slip op. at 18).

The trial judge had consulted the presiding judge *before* making its ruling and *before* being subjected to Evans' threats and emotional pleas. The court stated it was going to grant a mistrial, and had already arranged with Judge Strand to turn the case over for reassignment.

Without further consultation, the trial court reversed itself. The reversal came after emotional threats made by Evans, all of which was prejudicial and improper. Evans argued: "It's going to balloon and it's going to be fueled and it's going to create an enormous problem for judges and members of the Bar." (Transcript, Vol. XVIII, p. 49). Evans argued that "You declare a mistrial today and the things that you heard as implausible arguments in your chambers will come back to haunt all of us" (Transcript, Vol. XVIII, p. 51); "Once I lose my control on it, the Bar and the judiciary are going to suffer dreadfully, and my ability to control it is almost beyond my abilities to keep it within my grasp." (Transcript, Vol. XVIII, p. 52).

The trial judge yielded to those threats. This reversal further indicates the prejudice to Hing.

This Court further ignores a further ex parte conference (after the one which is of record) which was held by Evans and the trial judge which is not contained on the record, other than a mention that Evans had met with the trial judge to discuss jury instructions without the presence of other counsel. (Transcript, Vol. XXV, pp. 40–44).

The statements by the trial judge that he would provide a fair trial are not conclusive. It was Evans who complained about the judge's treatment of him before the jury. That treatment is not reflected in the record, but Evans claimed it involved nonverbal communication. The judge's nonverbal conduct and rulings on discretionary matters could equally apply to Hing and defense counsel as a result of the judge's attitude. It should not be Hing's responsibility to show prejudice in light of outrageous conduct by both counsel and the court.

The Court further concludes that because the jury did not return a verdict as to punitive damages that the punitive damage instruction was not prejudicial to Hing. How can the Court fairly assess the impact of the instruction? The very giving of the instruction implies that there is some justification for it. It presents a further stigma on the defendants to the jury.

Further, how can the Court assume that the verdict does not reflect a compromise as a result of the instruction, with some jurors in favor of dismissing the case against Hing and some in favor of granting punitive damages reaching a compromise verdict for liability against Hing, but no punitive damages?

By allowing the issue of punitive damages to be included in the case, McElhanon was permitted to present evidence as to Hing's wealth to the jury and to argue this

issue to the jury. How can the Court assess the impact of this evidence to the jury?

In addition to the punitive damage rulings, after the conference, the court allowed Greer to remain in the case, denied motions for mistrial based on closing arguments, made rulings on evidence, and denied motions for new trial.

The opinion discusses and cites the history of other litigation involving McElhanon. This litigation should not prejudice Hing's rights in this case and this case should be decided on its own merits.

It is particularly unfair for this Court to cite against Hing the Greer criminal tax case. *United States v. Greer,* 607 F.2d 1251 (9th Cir.), *cert. denied,* 444 U.S. 993, 100 S. Ct. 526 (1979) (Slip op. at 7, 20, n.2, 6). McElhanon's tactic at trial was to attempt to tar Hing with the misconduct of his clients. Because of the conduct of the trial judge, counsel, and McElhanon, McElhanon succeeded in this attempt. It is unfair for this Court to do likewise.

This Court is completely correct that there comes a time when every case must end. However, it should not end at the expense of a litigant's right to a fair trial. How could the length of time of the appeal, and the multiplicity of litigation created by Harris, Greer, and McElhanon, in any way reduce the seriousness of the misconduct of Evans, McElhanon, and the trial judge as to defendant Hing? The practical result of the Court's decision is to encourage further acts of misconduct by counsel and litigants, by permitting this litigant and his counsel to reap the fruits of their misconduct.

The seriousness of counsel's misconduct in this case certainly exceeds that of Mr. Ronwin in *In re Ronwin,* 136 Ariz. 566, 667 P.2d 1281 (1983). Here, the unfounded accusations of perjury and subornation of perjury were made in an ex parte conference with the trial judge. After noting the numerous accusations of perjury and subornation of

perjury leveled by Mr. Ronwin against members of the bar, this Court articulated a principle every bit as applicable to Mr. Evans as it was to Mr. Ronwin:

> "The examples cited suffice to establish that Ronwin's reaction to adversity manifests itself in behavior which is grossly improper for a lawyer and which cannot be tolerated. This conclusion does not evince a lack of toleration for Ronwin; it simply acknowledges that we can make no special rule for Ronwin. What is permitted Ronwin is necessarily permitted all other members of our bar. Habitual filing of actions against adjudicatory officers, witnesses and opposing counsel is both vexatious and harassing. Worse, it is a tactic calculated to intimidate. It cannot be tolerated unless we are willing to surrender reason to those whose conduct is uninhibited by reality and civility. Adjudication of facts and resolution of legal disputes cannot be properly accomplished in the absence of restraint and civilized behavior by lawyers. Care with words and respect for courts and one's adversaries is a necessity, not because lawyers and judges are without fault, but because trial by combat long ago proved unsatisfactory." 667 P.2d at 1287.

In this case, in the face of the restrained behavior of counsel and his client, the "adjudication of facts and resolution of the legal dispute" were not properly accomplished. Hing was denied his right to a fair trial.

Conclusion

It is respectfully requested that the Court reconsider its prior opinion and remand the case for a new trial or for a ruling as to the other issues not ruled upon by any appellate court.

Respectfully submitted,

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Copy of the foregoing mailed this 18th day of November, 1986, to:

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A-68

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

MISTER DONUT OF AMERICA, INC., a Delaware corporation,	
Plaintiff-Counter-Defendant-Appellant,	No. 18544-PR
v.	1 CA-CIV 7020
DEAN HARRIS and JANE DOE HARRIS, his wife, and JACK LANE and JANE DOE LANE, his wife,	Yavapai County Superior Court No. 40087
Defendants-Counter-claimants-Appellees.	MISTER DONUT'S RULE 22 MOTION FOR RECONSIDERATION

Pursuant to Rule 22 of the Rules of Civil Appellate Procedure, plaintiff-appellant Mister Donut of America, Inc. ("Mister Donut") requests this Court to reconsider that portion of its order which affirms the judgment of the trial court. We request, rather, that the Court's order remand this case to the Court of Appeals for further proceedings not inconsistent with this opinion. There remains a crucial matter not decided by the Court of Appeals.

I. Procedural Background; the Undecided Question.

This appeal arises out of the sale of a Mister Donut franchise to the defendants-appellees Dean Harris, Jack Lane, and their wives ("defendants"). The defendants accused Mister Donut of fraud in the inducement and breach

of the franchise agreement, a trial was held, and ultimately the jury found against Mister Donut and awarded $50,618 in damages for fraud, no damages for breach, and approximately 14 times the actual damages or $750,000 in punitive damages.

Mister Donut appealed and, as recognized by the Court of Appeals at page 5 of its decision, raised at least four separate issues: (1) that the statute of limitations barred the defendants' fraud claim; (2) that the trial court erred in refusing to require the defendants to elect between their contract and fraud claims; (3) that the trial court erred in admitting testimony by one witness and portions of the deposition of another; and (4) that punitive damages should not have been awarded and, alternatively, that the amount awarded was excessive. Finding the defendants' fraud claim time barred, the Court of Appeals reversed the judgment in favor of the defendants on the fraud claim. The Court of Appeals neither considered nor resolved Mister Donut's punitive damage objection.

Thereafter, defendants sought and this Court accepted review of the Court of Appeals' limitation and evidentiary holdings. None of the issues presented in the petition for review concerned the award or amount of punitive damages. Disagreeing with the Court of Appeals, this Court found no time bar and, as set forth at page 11 of its decision, affirmed the trial court judgment.

In affirming the trial court's judgment, however, the Court not only affirmed the award of actual damages but also the award of punitive damages even though no appellate court had ever reached, considered, or resolved Mister Donut's objections to the punitive damages. Mister Donut respectfully requests the Court to reconsider its order and to remand this appeal to the Court of Appeals for a determination of the punitive damage issue raised before but not decided by that court.

II. Mister Donut is Entitled to Appellate Review of the Punitive Damage Award.

As the Court of Appeals recognized at page 5 of its decision, Mister Donut appealed from the lower court's award of punitive damages. Mister Donut's punitive damage objection was not decided by the Court of Appeals because it did not need to be. Because the Court of Appeals ruled that the statute of limitations barred the defendants' fraud action, the intermediate court never reached the punitive damage question.

The punitive damage question was not included among the issues presented to this Court for review nor could it have been. Since there was no decision on punitive damages from the Court of Appeals, there was nothing for this Court to review. See R. Civ. App. Pro 23(c)(4) which lists the reasons why a petition for review should be granted. Moreover, punitive damages could not have been designated as a cross-issue since a ruling on punitive damages would not have constituted an alternative reason supporting the Court of Appeals limitations holding. *See Aergarter v. Duncan,* 7 Ariz. App. 239, 437 P.2d 991 (1968); *Maricopa County v. Corporation Commission of Arizona,* 79 Ariz. 307, 289 P.2d 183 (1955).

Given this Court's reversal of the Court of Appeals' decision, Mister Donut's punitive damage challenge is now ripe and is entitled to appellate review. In Arizona, the substantive right to appeal is statutory, *see generally* A.R.S. § 12-2101(B) and (F)(1) (appeal may be taken from final judgment of Superior Court and orders granting or refusing new trial), and that right may not be diminished or altered. *See generally Matter of Appeal in Pima County Juvenile Action,* 135 Ariz. 278, 280, 660 P.2d 1205 (1982), *citing State v. Birmingham,* 95 Ariz. 310, 390 P.2d 103, *modified on rehearing,* 96 Ariz. 109, 392 P.2d 775 (1964). Incorporated within this statutory right to appeal is the right to have issues raised on appeal decided on the merits.

On point is *Courtright Cattle Company v. Dolsen Company*, 94 Wash. 2d 645, 619 P.2d 344 (1980), where the court held that a right to appeal creates a right to have a trial court's ruling on a particular issue reviewed. There, as here, the appellant appealed a trial court's damage award to the Court of Appeals which, as here, did not decide the issue because it disposed of the appeal on other grounds. The Washington Supreme Court reversed the intermediate court's decision, but found that the appellant was entitled to appellate review of the damages award:

> Because it is clear that Dolsen [the appellant] preserved its appeal of the trial court's damage award to the Court of Appeals and because consideration of the issues properly raised before the Court of Appeals is provided as a matter of right . . . we now remand the case to the Court of Appeals for consideration of Dolsen's challenges to the award of damages to Courtright. In doing so, we express no opinion regarding the correctness of Dolsen's position. *We note only that Dolsen has the right to have the trial court's decision on this matter reviewed by an appellate court.*

619 P.2d at 351 (emphasis added).

In sum, Mister Donut is entitled to appellate review of the punitive damage award as a matter of right. Moreover, review of the punitive damages is especially vital here where, as the Court has recently recognized, punitive damages are an "extraordinary civil remedy," such damages can be misapplied, and should not be awarded unless there is an "evil mind" in addition to outwardly aggravated, outrageous, malicious, or fraudulent conduct. *Linthicum v. Nationwide Life Insurance Co.*, No. CV 86-0061-PR, slip op. 13–14 (Ariz. July 23, 1986).

III. Remand to the Court of Appeals is Proper.

We have been unable to find any Arizona case or rule which governs this procedural situation. The teachings from other jurisdictions is clear: where a higher court reverses, that court should not review questions which have not been addressed by an intermediate court and such questions should be remanded to the intermediate court for determination. On point are the following authorities:

a. United States Supreme Court: *J. Truett Payne Co. v. Chrysler Motors Corporation,* 451 U.S. 557, 568, 101 S. Ct. 1923, 1930, 60 L. Ed. 2d 1981:

> Because the court below bypassed the issue of liability and went directly to the issue of damages, we simply do not have the benefits of its views as to whether respondent in fact violated § 2(a) [of The Clayton Act as amended by the Robinson-Patman Act] . . . Accordingly, we think the proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence aduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act. We do not ordinarily address for the first time in this court an issue which the Court of Appeals has not addressed, and we think this would be a poor case in which to depart from that practice.

See also United States v. United Continental Tuna Corporation, 425 U.S. 164, 181–182, 96 S. Ct. 1319, 1329, 47 L. Ed. 2d 653 (1976); *Logue v. United States,* 412 U.S. 521, 533, 93 S. Ct. 2215, 2222, 37 L. Ed. 2d 121 (1973); *Zenith Radio Corporation v. Hazeltine Research, Inc.,* 395 U.S. 100, 140–141, 89 S. Ct. 1562, 1585–86, 23 L. Ed. 2d 129 (1969); *Swanson v. Traer,* 354 U.S. 114, 116–17, 77 S. Ct. 1116, 1118, 1 L. Ed. 2d 1221 (1957).

b. Illinois: *Hahn v. Hurley* 9 Ill. 2d 74, 136 N.E.2d 822, 824 (1956):

> Where a judgment of reversal by the Appellate Court is based upon an erroneous view of the law with respect to one branch of the case, and it appears from the opinion that for such reason it has refused to consider and pass upon other assignments of error which it should consider, the cause will be remanded to that court upon reversal of its judgment, with direction to consider and pass upon such questions.

See also Moss v. Wagner 27 Ill. 2d 551, 190 N.E.2d 305, 307–308 (1963); *Foreman v. Holsman,* 10 Ill. 2d 551, 141 N.E.2d 31, 33 (1957).

c. Louisiana: *McMillan v. State Farm Mutual Automobile Insurance Company,* 356 So. 2d 1368, 1370 (La. 1978) (issue not reached by Court of Appeals will be remanded by Supreme Court for resolution).

d. New York: *Rudman v. Cowles Communications, Inc.* 30 N.Y.2d 1, 280 N.E.2d 867, 874, 330 N.Y.S.2d 33 (1972); *Spano v. Perini,* 25 N.Y.2d 11, 250 N.E.2d 31, 35–36, 302 N.Y.S.2d 527 (1969).

e. Washington: *Courtright Cattle Company v. Dolsen Company,* 94 Wash. 2d 645, 619 P.2d 344, 351 (1980).

IV. Conclusion.

For the reasons set forth herein, Mister Donut asks that the Court correct its order and remand to the Court of Appeals for proceedings not inconsistent with this opinion.

RESPECTFULLY SUBMITTED this 7th day of August, 1986.

LEWIS AND ROCA

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COPY of the foregoing mailed this 7th day of August, 1986, to:

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